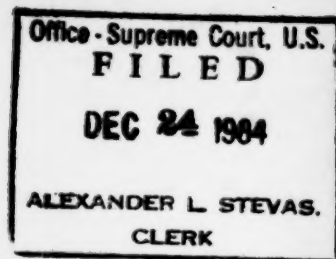


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No. 84-680



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In The  
Supreme Court Of The United States  
October Term, 1984

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CAMEO CONVALESCENT CENTER, INC.,  
a Wisconsin corporation,

Cross-Petitioner,

v.

DARLA SENN, et al,

Cross-Respondents.

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ON WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE SEVENTH CIRCUIT

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BRIEF IN REPLY TO BRIEF IN OPPOSITION  
TO PETITION FOR WRIT OF CERTIORARI

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#### STATEMENT OF THE CASE

The facts of this case are as stated in our original cross-petition for the writ. Cameo does, however, take exception to a statement made in the

Statement of the Case submitted by the cross-respondent, Darla Senn.

At page 8 of the cross-respondent's brief, Ms. Senn states that the jury, the district court, and the Court of Appeals all found that there was no nexus between Senn's initial issuance of the NOV's in September and the placement of Cameo on the SORL. In fact, neither the jury nor the district court ever made such a determination. Indeed, as we indicated in our original cross-petition, based on the court's instructions, and the jury's finding of abuse of process and malicious prosecution in the context of a §1983 action, we believe that the jury, by its verdict, made exactly the opposite finding.

### SUMMARY OF ARGUMENT

Most of the arguments advanced by the cross-respondent in its brief in opposition to the cross-petition were adequately addressed in our original brief. However, the cross-respondent's argument, that Olim v. Wakinekona, 103 S.Ct. 1741 (1983) eclipsed any prior holdings by the circuit courts that an abuse of process violated due process in the context of a proceeding in which a protected liberty or property interest was at stake, is an unwarranted extension of that decision.

In addition, this Court's holding in Rizzo v. Goode, 423 U.S. 362 (1975) does not preclude a jury finding that Senn's issuance and pursuit of the original NOV's was the proximate cause

of Cameo's placement on the Suspension of Referrals List.

### ARGUMENT

The original cross-petition for the writ of certiorari advanced two primary arguments in support of this Court's granting of the writ. First of all, the cross-petition argued that there was a conflict among the circuits as to just what elements must be established in order to state a due process claim under 42 U.S.C. §1983, for an abuse of process or malicious prosecution, undertaken under color of state law, by a public official. Secondly, the cross-petition argued that the circuit court violated previous decisions of this Court, and the province of the jury, when it vacated the judgment entered against Darla Senn.

In response to our first argument, the cross-respondent contends that this Court's decision in Olim v. Wakinekona, 103 S.Ct. 1741, 1748 (1983) "eclipsed" those circuit court decisions which held that it was not always necessary to establish an independent deprivation of a protected interest, other than the interest at stake in the proceeding itself, in order to establish that a malicious prosecution or abuse of process constituted an actionable 42 U.S.C. §1983 claim. In response to our second line of argument, the cross-respondent argued that this Court's decision in Rizzo v. Goode, 423 U.S. 362, 371, 375-376 (1975) precludes a finding that Darla Senn's initial issuance and pursuit of the NOV's was

the proximate cause of Cameo's placement on the SORL.

For the reasons which follow, neither of those two arguments has merit.

I. OLIM V. WAKINEKONA IS NOT APPLICABLE TO THIS CASE.

Our cross-petition argued that this Court should assert jurisdiction because it has never determined the nature of the required protected interests in the context of an abuse of process claim under the Civil Rights Act. Specifically, this Court has never decided whether a liberty or property interest need be at stake in the proceeding or needs to have been actually taken in order to trigger due process protection. The cross-respondent argued that the issue is foreclosed by Olim, supra.

Olim was an action by a state prisoner in the Hawaii state penitentiary challenging his transfer to a prison on the mainland. The prisoner had contended that his transfer to the mainland without a prior evidentiary adversary hearing deprived him of a liberty interest without due process of law in violation of the Fourteenth Amendment and §1983.

In finding that the prisoner's due process rights had not been violated, this Court relied heavily upon the change in status of the prisoner which had occurred due to his criminal conviction. The Court held that conviction changed the prisoner's status so as to extinguish most of his liberty interests. This Court then went on to find that confinement in a certain prison, or even

in a certain state, was not one of those liberty interests which survived criminal conviction, stating that:

"Confinement in another state, unlike confinement in a mental institution, is 'within the normal limits or range of custody which the conviction has authorized the state to impose.'" 103 S.Ct. at p. 1746.

The Court then concluded that, because there was no protected interest at stake, no hearing was required by the due process clause.

Cameo has suffered no criminal conviction nor any similar circumstance, which would in any way serve to reduce its normal range of protected interests. Thus, Cameo was clearly entitled to an evidentiary hearing prior to the imposition of any of the sanctions which would have ensued had Cameo not

contested the original issuance of the notices of violation.

The question which we hope to present to the Court is whether the abuse or misuse of that hearing process, as well as its actual denial, constitutes a violation of due process and \$1983. In deciding this question, the rationale upon which this Court decided Olim, supra, is simply inapplicable.

II. RIZZO V. GOODE DOES NOT DECIDE  
CROSS-PETITIONER'S CLAIMS.

The cross-respondent also argues that this Court's decision in Rizzo v. Goode, 423 U.S. 362, 371, 375-76 (1975), has already decided the proximate cause issue adversely to the cross-petitioner. In fact, Rizzo, supra, did not deal at all with the question of whether a specific constitutional tort was the proximate

mate cause of a deprivation so as to trigger §1983 liability.

In Rizzo, supra, this Court specifically concluded that there were deprivations of protected interests which had occurred. That was not even an issue in the case.

The question before this Court in Rizzo was whether isolated violations of individuals' civil rights were sufficient to support a broad-based mandatory injunction, issued by the district court, against the entire police department. This Court concluded that, in the specific context of that case, that such isolated violations were not sufficient.

In reaching that conclusion, the Court noted that the officers who had engaged in those civil rights violations were not even parties to the action. It

also noted that plaintiffs had not established involvement or condonation of these acts by the department management. Based on this set of circumstances, this Court concluded that a few isolated incidents of civil rights violations, without more, was insufficient to support a broad-based mandatory injunction.

There is no broad-based injunction against the department even at issue in this proceeding. Moreover, the individual whom the jury concluded had committed the act, Darla Senn, is a party, in fact the party, to this proceeding. Thus, the holding of Rizzo, supra, does not in any way affect the question of whether this Court should review the propriety of the 7th Circuit Court of

Appeals decision setting aside the jury verdict on the proximate cause issue.

Cross-respondent's argument that Cameo never requested the jury to make a specific finding of proximate cause for placement on the SORL also misses the point. Cameo is not seeking to invalidate the jury verdict because of faulty instructions, cross-respondent is.

In reality, Cameo proposed a general proximate cause instruction. (R. 149) Cross-respondent also proposed a general instruction, not a specific instruction on the SORL question. (Resp. App. 25A) Thus, the cross-respondent cannot now be heard to argue that the verdict was improper because a specific proximate cause instruction on the SORL was not given.

The cross-respondent also argues that, if this Court were to conclude that the circuit court did improperly set aside the jury verdict on the proximate cause issue, that verdict would still need to be re-examined in light of the prosecutorial immunity question. Unfortunately for the cross-respondent, no such re-examination is necessary. Darla Senn never raised prosecutorial immunity as a defense in her answer to the complaint. (Cross-Pet. App. 4A) Moreover, the issue was submitted to the jury over cross-petitioner's objection, and the jury found no immunity.

Finally, even if one were to find the verdict improper because the specific causation instruction was not given, the appropriate remedy would have

been to remand for a new trial on the question, not to have the appellate court make its own factual finding of no proximate cause.

#### CONCLUSION

It is respectfully submitted that this Court should grant the cross-petition for the writ of certiorari and review the case on its merits.

Respectfully submitted,

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